

Fall 2015

## A Corporation Has No Soul, and Doesn't Go to Church: Relating the Doctrine of Piercing the Veil to *Burwell v. Hobby Lobby*

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### Recommended Citation

Goforth, Carol (2015) "A Corporation Has No Soul, and Doesn't Go to Church: Relating the Doctrine of Piercing the Veil to *Burwell v. Hobby Lobby*," *South Carolina Law Review*: Vol. 67 : Iss. 1 , Article 5.  
Available at: <https://scholarcommons.sc.edu/sclr/vol67/iss1/5>

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**A CORPORATION HAS NO SOUL, AND DOESN'T GO TO CHURCH: RELATING  
THE DOCTRINE OF PIERCING THE VEIL TO *BURWELL V. HOBBY LOBBY***

Carol Goforth \*

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The U.S. Supreme Court's opinion in *Burwell v. Hobby Lobby*<sup>1</sup> found, for the first time, that shareholders and directors in a for-profit corporation could assert "free exercise" claims ostensibly on behalf of the corporation.<sup>2</sup> While other commentators have been quick to look at what this means under general constitutional and business law principles, this article examines the decision with a particular focus on case law dealing with the doctrine of piercing of the corporate veil. Piercing cases are plentiful and can be found in every state. An examination of these cases provides strong support for the notion that allowing individuals in control of a for-profit corporation to assert their religious views through the corporation is inconsistent with the prior understanding of what it means to have and operate a business corporation.

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1. 134 S. Ct. 2751 (2014).

2. *Id.* at 2772–74.

On June 30, 2014, a sharply divided Supreme Court held that portions of the regulations enacted to implement the Patient Protection and Affordable Care Act of 2010 (ACA)<sup>3</sup> (often called “Obamacare” in the popular press) were invalid because they violated the Religious Freedom Restoration Act of 1993 (RFRA)<sup>4</sup> by imposing “substantial . . . burdens [upon] the exercise of religion” without being the “least restrictive means of serving a compelling government interest.”<sup>5</sup> As most readers probably know, the *Hobby Lobby* opinion stemmed from a lawsuit challenging regulations promulgated by the U.S. Department of Health and Human Services (HHS), which would have required for-profit corporations to offer employees health insurance including coverage of certain contraceptive methods that the plaintiffs claimed to be abortifacients objectionable on religious grounds.<sup>6</sup> The challenge was brought by various individual shareholders of Conestoga Wood Specialties (a closely held Pennsylvania corporation), Hobby Lobby (a closely held Oklahoma corporation), and Mardel (also a closely held Oklahoma corporation), and was also brought in the name of the corporations, all of which were organized for profit or business purposes.<sup>7</sup> The Supreme Court opinion, despite efforts by the five-justice majority to frame the holding in narrow terms,<sup>8</sup> includes a lengthy and scathing dissent authored by Justice Ginsburg and joined (at least in part) by the other two female justices on the

3. Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 (2012).

4. Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

5. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

6. See *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1122–23 (10th Cir. 2013). More precisely, the issue stemmed from HHS regulations adopted pursuant to the Patient Protection and Affordable Care Act of 2010 (ACA), which requires employers with 50 or more employees to offer health plans or insurance that provides “minimum essential coverage.” 26 U.S.C. §§ 4980H(a), (c)(2)(A) (2012) (referencing 26 U.S.C. § 5000A(f)(2) (2012) for the definition of “eligible employer sponsored plan”). In August of 2011, HHS (through its Health Resources and Services Administration) adopted Women’s Preventative Services Guidelines that generally required nonexempt employers to provide coverage for all “Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling.” Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the ACA, 77 Fed. Reg. 8725 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147) (quoting HRSA Women’s Preventative Services Guidelines, <http://www.hrsa.gov/womensguidelines> (last visited Sept. 10, 2015)). Four of the approved methods prevent fertilized eggs from developing by inhibiting the egg’s ability to attach to the uterus. *Hobby Lobby*, 134 S. Ct. at 2762–63.

7. *Hobby Lobby*, 134 S. Ct. at 2764–65.

8. “We do not hold . . . that for-profit corporations and other commercial enterprises can ‘opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.’ Nor do we hold . . . that such corporations have free rein to take steps that impose ‘disadvantages . . . on others’ . . . . And we certainly do not hold or suggest that ‘RFRA demands accommodation of a for-profit corporation’s religious beliefs no matter the impact that accommodation may have on’ . . . [others] . . . .” *Id.* at 2760 (quoting *id.* at 2787 (Ginsburg, J., dissenting)) (contrasting the majority’s understanding of the breadth of the opinion with the description offered in Justice Ginsburg’s dissent).

Court.<sup>9</sup> The dissent criticizes both the analysis and the potentially sweeping breadth of the opinion.<sup>10</sup>

One of the skills often associated with “thinking like a lawyer” is the ability to see issues from different perspectives, and any good lawyer knows that the way in which you frame the question can help you arrive at a particular conclusion. Justice Alito, writing for the majority, framed the principal issue in terms of whether the right to freely exercise religious choice disappears because of the decision to operate through the vehicle of a for-profit corporation.<sup>11</sup> The majority opinion first points out that HHS had conceded that nonprofit corporations were protected by RFRA,<sup>12</sup> and then uses the dissent’s statement that protecting the religious autonomy of such nonprofit corporations “often furthers individual religious freedom. . . .”<sup>13</sup> It was a logical next step to conclude that in the case before the Court, the religious liberties of the shareholders of the for-profit corporations should have been similarly protected.<sup>14</sup>

The majority opinion also specifically focuses on whether there was a logical distinction between having a profit-making motive as opposed to a personal or religious one in determining whether a business should have free exercise rights.<sup>15</sup> By focusing on the profit motive, prior authority dealing with free exercise rights in the case of a sole proprietorship operating for profit<sup>16</sup> became relevant to the Court’s analysis. The majority opinion asks: “If . . . a sole proprietorship that seeks to make a profit may assert a free-exercise claim, why can’t Hobby Lobby, Conestoga, and Mardel do the same?”<sup>17</sup> Since, in *Braunfeld*, profit motive had not disqualified the owner of a sole proprietorship from asserting free exercise rights,<sup>18</sup> the Court suggests that it is logical to allow owners of for-profit corporations similar rights.<sup>19</sup>

In addition to a discussion of the legislative intent behind RFRA and its proper interpretation,<sup>20</sup> the majority opinion also considers, albeit briefly, how

9. *Id.* at 2787 (Ginsburg, J., dissenting). Justices Kagan and Breyer agreed that the challenge to the regulations should fail on the merits, but would not have decided whether corporations or their owners should be allowed to bring claims under RFRA. *Id.* at 2806 (Breyer, J., and Kagan, J., dissenting).

10. *Id.* Justice Ginsburg’s opinion begins on page 2787 of the opinion and takes up 19 pages. *Id.* at 2787–806.

11. *Id.* at 2769 (majority opinion).

12. *Id.*

13. *Id.* (quoting *id.* at 2794 (Ginsburg, J., dissenting)).

14. *Id.* at 2768.

15. *Id.* at 2771.

16. *Braunfeld v. Brown*, 366 U.S. 599, 81 S. Ct. 1144 (1961).

17. *Hobby Lobby*, 134 S. Ct. at 2770.

18. *See Braunfeld*, 366 U.S. at 601–03, 81 S. Ct. at 1145–46.

19. *Hobby Lobby*, 134 S. Ct. at 2769 (citing *Braunfeld*, 366 U.S. 599).

20. The majority and dissenting opinions in *Hobby Lobby* contain a relatively extensive examination of whether RFRA was designed to codify the law as it existed prior to the Court’s decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S.

difficult it might be to ascertain a corporation's religious views.<sup>21</sup> The majority neatly sidesteps the issue of whether a corporation can even possess a religious

872 (1990). *Hobby Lobby*, 134 S. Ct. at 2761 n.3 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997)).

21. *Id.* at 2774. The title of this Article, which references the possession of a soul and attendance at church, is not intended to be a serious definition of what "religion" means or entails, at least as used in the free exercise clause of the First Amendment. Those concepts reflect the basic idea that a for-profit corporation has none of the attributes that would enable it to have any religious viewpoint of its own, however religion is defined. The question of what exactly a "religion" or "religious view" entails is far beyond the scope of these materials. See *Africa v. Pennsylvania*, 662 F.2d 1025, 1031 (3d Cir. 1981) ("Few tasks that confront a court require more circumspection than that of determining whether a particular set of ideas constitutes a religion. . . ."). For an additional perspective of the complexity of this issue, a psychologist once compiled a non-exclusive list of 48 scholarly definitions of religion. JAMES H. LEUBA, A PSYCHOLOGICAL STUDY OF RELIGION 339–61 (1912) (citations omitted) (citing forty-eight scholarly definitions of religion).

In defining religion, "[f]lexibility and careful consideration . . . are needed. Still, it is important to have some objective guidelines in order to avoid Ad hoc justice." *Malnak v. Yogi*, 592 F.2d 197, 210 (3d Cir. 1979). Very generally speaking, courts have been cautioned to avoid inquiring into the substance of beliefs, but to use a function test, asking if beliefs "function" as a religion. See *United States v. Seeger*, 380 U.S. 163, 165–66 (1965).

If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by . . . God" . . . . Because his beliefs function as a religion in his life, such an individual is as much entitled to a "religious" conscientious objector exemption . . . as is someone . . . [with] traditional religious convictions.

*Welsh v. United States*, 398 U.S. 333, 340 (1970). In *United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996), the Tenth Circuit utilized an extensive set of factors in applying a functional approach to the definition of religion. The factors used by the court in finding that the beliefs in question amounted only to a philosophy rather than a religion were: (1) whether the ideas address ultimate questions that are deep and imponderable; (2) whether the beliefs are metaphysical in nature; (3) whether they involve a moral or ethical system; (4) whether they are comprehensive; and (5) whether the beliefs are accompanied by the accoutrements of a religion. *Id.* at 1483–84 (citing *United States v. Meyers*, 906 F. Supp. 1494, 1502–03 (1995)).

What all of this has in common is an understanding that religion and religious views encompass a sincerely held belief system that addresses broad, ethical, and moral considerations. A corporation, being an artificial "person," has no such independent beliefs because it has no mind or opinions at all. It acts only as directed by others, who are supposed to be furthering corporate interests when they act in their capacity as directors or managers of the business.

Even the majority opinion in *Hobby Lobby* appears to recognize that it has to be the religious beliefs of the owners that matter if a corporation is to be given free exercise protections. *Hobby Lobby*, 134 S. Ct. at 2768 ("[P]rotecting the free-exercise rights of corporations like *Hobby Lobby*, *Conestoga*, and *Mardel* protects the religious liberty of the humans who own and control those companies.").

For more detailed considerations of what constitutes a religion, see Bernard E. Jacques, *Discrimination on the Basis of Religion Is Prohibited! But What Is Religion?*, 82 CONN. B.J. 365 (2008); Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology*, 83 N.D. L. REV. 123, 219–23 (2007) (citations omitted); Susannah P. Mroz, *True Believers?: Problems of Definition in Title VII Religious Discrimination Jurisprudence*, 39 IND. L. REV. 145 (2005); Jane M. Ritter, *The Legal Definition of Religion: From Eating Cat Food to White Supremacy*, 20 TOURO L. REV. 751 (2004); Steven D.

view that might be entitled to protection by starting with the observation that a corporation's owners, managers, or employees can all have valid and protected religious interests.<sup>22</sup> The majority opinion then asserts that large publicly traded corporations are unlikely to raise any free exercise claim because of "practical restraints."<sup>23</sup> With regard to the ability to ascertain the religious preferences of a closely held corporation, the majority opinion simply observes that "[s]tate corporate law provides a ready means for resolving any conflicts."<sup>24</sup>

By framing the first of these issues in terms of whether the free exercise clause applies to corporations, it becomes easy to draw parallels between for-profit corporations and associations organized as corporations but with a nonprofit focus. Because HHS conceded that the RFRA applied to nonprofit corporations, it seems logical, even intuitive, that other corporate "persons" would also be protected by the reach of the free exercise clause. If instead the starting point of the discussion had been the differences between not-for-profit enterprises and corporations organized for a profit, a different analysis might have followed.

Not-for-profit corporations are typically quite distinct from for-profit businesses.<sup>25</sup> There are often no shareholders or investors,<sup>26</sup> and both

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Collier, *Beyond Seeger/Welsh: Redefining Religion Under the Constitution*, 31 EMORY L.J. 973, 981–82 (1982) (citing *Welsh*, 398 U.S. at 335, 340, 344–45; *Seeger*, 380 U.S. at 165–66, 173, 188); Anita Bowser, *Delimiting Religion in the Constitution: A Classification Problem*, 11 VAL. U. L. REV. 163 (1977); Alfred G. Killilea, *Standards for Expanding Freedom of Conscience*, 34 U. PITT. L. REV. 531 (1973); Joseph M. Dodge, II, *The Free Exercise of Religion: A Sociological Approach*, 67 MICH. L. REV. 679 (1969); A. Stephen Boyan, Jr., *Defining Religion in Operational and Institutional Terms*, 116 U. PA. L. REV. 479 (1968); Comment, *Defining Religion: Of God, the Constitution and the D.A.R.*, 32 U. CHI. L. REV. 533 (1965).

22. *Hobby Lobby*, 134 S. Ct. at 2768 ("And protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies . . . . Corporations, (separate and apart from) the human beings who own, run, and are employed by them, cannot do anything at all.").

23. *Id.* at 2774. The example noted is that "unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable" *Id.* Of course it is not the "unrelated shareholders" that would make such a decision under the law of any state corporate statute; that is a management decision that would be made by the board of directors, and there are plenty of cases out there that suggest a tiny minority on some boards can wield tremendous influence over all kinds of issues. *See, e.g.*, *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581, 590 (N.J. 1953) (using the business judgment rule to hold that the decision to make a corporate donation made by a few board members was a "lawful exercise of the corporation's implied and incidental powers under common-law principles"). Moreover, corporations can be controlled by a single family or related group, and still have public shareholders.

24. *Hobby Lobby*, 134 S. Ct. at 2756.

25. *See generally* Corp. of Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 344 (1987) (Brennan, J., concurring) (analyzing several not-for-profit and for-profit distinctions in the courts analysis); Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 845 (1980) (analyzing the different functions of a not-for-profit corporate charter and a for-profit corporate charter).

26. *See generally* Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 567 (1981) (amending a standard used in for-profit corporations to be used in not-for-

contributors and the directors share a particular viewpoint or agenda, which may be religious in nature.<sup>27</sup> Moreover, the objective of the not-for-profit corporation is generally to advance those interests.<sup>28</sup> Given this essential fact, it seems entirely appropriate to protect the free exercise rights of individual members of groups that are organized for such purposes. For-profit business, on the other hand, do not attract participants in the same way. There is, for example, no guarantee that the directors of a for-profit corporation will have the same perspectives on issues unrelated to the “business” of the enterprise as the shareholders and other constituents (such as employees or creditors) involved in the venture. Certainly the commonality of interests typically found among participants in not-for-profit enterprises, such as the directors, donors, volunteers, employees and beneficiaries, is not guaranteed or even likely in a for-profit business corporation. The purpose of a for-profit corporation is to run a business and make a profit, not to advance any particular point of view.<sup>29</sup> Decisions made for such a corporation should further the business objectives of the entity because the commonality of interests that might be expected among the entity’s owners and participants would generally be that of making a profit.<sup>30</sup>

The majority opinion’s focus on whether the existence of a profit motive provides a basis for distinguishing between business forms when it comes to the question of free exercise rights provides Justice Alito with a reason to cite an earlier opinion<sup>31</sup> where the fact that the plaintiffs had been acting through sole proprietorships had not disqualified them from maintaining a free exercise claim.<sup>32</sup> This result is not surprising, especially from a business organizations point of view, because sole proprietorships are not distinct legal persons separate from their owners.<sup>33</sup> It is not the existence or absence of a profit motive that

profit corporations to accommodate the fact that most not-for-profit corporations have members rather than shareholders or investors).

27. See, e.g., *Amos*, 483 U.S. at 344 (“This makes plausible a church’s contention that an entity is not operated simply in order to generate revenues for the church, but that the activities themselves are infused with a religious purpose.”).

28. See *id.* (“[U]nlike for-profit corporations, nonprofits historically have been organized specifically to provide certain community services, not simply to engage in commerce.”).

29. See Mitchell F. Crusto, *Extending the Veil to Solo Entrepreneurs: A Limited Liability Sole Proprietorship Act (LLSP)*, 2001 COLUM. BUS. L. REV. 381, 402 (2001) (“Business for Profit: This is an entity established to assist business operators for profit, not to be used for non-business purposes and not for nonprofit or not-for-profit activities.”).

30. See Terry L. Corbett, *Healthcare Corporate Structure and the ACA: A Need for Mission Primacy Through a New Organizational Paradigm?*, 12 IND. HEALTH L. REV. 103, 166 (2015) (“Some have argued that the concept of ‘mission primacy’—a ‘doctrinal recognition’ that a corporation’s ‘articulated mission’ should be its *legally-enforceable* primary objective (as is profit-maximization for a for-profit corporation) . . .”).

31. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767 (2014) (citing *Braunfeld v. Brown*, 366 U.S. 599, 601 (1961)).

32. *Braunfeld*, 366 U.S. at 603.

33. The sole proprietorship is unlike most other business forms available in this country. “There is no distinct body of law dedicated to the sole proprietorship. It is neither a creature of statute nor of contract. A thorough review of fifty states’ statutes shows that not one state

distinguishes shareholders and corporations from sole proprietors and proprietorships; what matters is the fact that a corporation is a separate and distinct legal person from its owners.<sup>34</sup>

As previously mentioned, the majority opinion in *Hobby Lobby* does briefly address the issue that it might be hard to ascertain the religious views of a for-profit corporation.<sup>35</sup> However, the potential problems that might be associated with efforts to determine the “sincere ‘beliefs’” of a publicly traded enterprise are dismissed with the somewhat cavalier suggestion that public companies are “unlikely” to assert such claims.<sup>36</sup> The Court’s solution to the problem of who gets to decide these views on behalf of closely held corporations is simply that “state corporate law” controls, because corporate statutes offer rules for resolving conflicts of opinion on business issues.<sup>37</sup> By starting with this kind of analysis, the majority neatly avoids the question of whether the corporation itself can truly be said to have religious views in the first place. Certainly no mainstream churches admit corporations to their congregations and, while the individual shareholders and directors of corporations are entitled to their religious beliefs and opinions, as the dissent notes,<sup>38</sup> never before had the Court suggested that corporations have their own religious views worthy of judicial protections.<sup>39</sup>

Not surprisingly, Justice Ginsburg’s dissent both starts and ends with different questions and responses.<sup>40</sup> Perhaps most importantly, both in terms of framing and discussing the issues, the dissent relies far more heavily on the legal separation between the owners of a for-profit corporation and the corporation itself.<sup>41</sup> Throughout the dissent, individuals are described as “natural persons,” while corporations are recognized as “artificial legal entities.”<sup>42</sup> The precedents cited in the dissent describe corporations as “invisible, intangible, and existing only in contemplation of law,”<sup>43</sup> having “no consciences, no beliefs, no feelings,

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legislature has enacted a sole proprietorship statute.” Crusto, *supra* note 29, at 386 (citing ALFRED F. CONRAD, AGENCY-PARTNERSHIP 10 (1988); HAROLD G. REUSCHLEIN & WILLIAM A. GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP 239, 242 (2d ed. 1990)). The proprietorship itself has no statutory existence or rights and offers its owner no special privileges.

34. See, e.g., C. T. CARR, THE GENERAL PRINCIPLES OF THE LAW OF CORPORATIONS 160, 162 (1905) (explaining the beginning of the concept that a corporation is a separate and distinct “juristic person”).

35. *Hobby Lobby*, 134 S. Ct. at 2774.

36. See *id.*

37. See *id.* at 2775.

38. See *id.* at 2795 (Ginsburg, J., dissenting).

39. *Id.* at 2794 (“Until this litigation, no decision of this Court recognized a for-profit corporation’s qualification for a religious exemption from a generally applicable law . . .”).

40. See *id.* at 2793, 2804–06.

41. See *id.* at 2797.

42. *Id.* at 2794.

43. *Id.* (quoting *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819)).



no thoughts, no desires.”<sup>44</sup> The dissent also tackles the majority’s question of why a sole proprietorship is allowed to have free exercise rights while a for-profit corporation is not by explicitly recognizing that “[i]n a sole proprietorship, the business and its owner are one and the same. By incorporating a business, however, an individual separates herself from the entity . . . .”<sup>45</sup>

This Article suggests a slightly different lens through which the question of a for-profit corporation’s potential for possessing and asserting free-exercise rights can be viewed—the case law surrounding the doctrine of piercing the veil. Certainly both the majority and dissenting opinions mention the legal separation between shareholders and their corporations,<sup>46</sup> but they do not do so with any particular focus on the doctrine of piercing the veil of corporate liability. “The most highly litigated issue in corporate law is whether to pierce the corporate veil,”<sup>47</sup> so there is a great deal of material here that can be used as a starting point in considering a corporation’s supposed free exercise rights. This Article does exactly that.

The starting point is a brief review of the piercing doctrine,<sup>48</sup> which is followed with a more detailed consideration of how the doctrine works and what it meant for corporations pre-*Hobby Lobby*.<sup>49</sup> This leads to consideration of how the Constitution had previously been construed to allow corporations to protect corporate rights.<sup>50</sup> The Article concludes with an assessment of the difference between those rights and free exercise claims, and how the Court’s decision in *Hobby Lobby* is an unprecedented departure from prior rulings that respected the separate personality of for-profit corporations.<sup>51</sup>

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44. *Id.* (quoting *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 466 (2010) (Steven, J., concurring in part and dissenting in part)).

45. *Id.* at 2797.

46. The way the majority and dissenting opinions talk about this separateness is interesting in and of itself. Justice Alito writes that “[c]orporations, ‘separate and apart from’ the human beings who own, run, and are employed by them, cannot do anything at all.” *Id.* at 2768 (majority opinion). The dissenting opinion emphasizes the separation quite differently: “By incorporating a business, however, an individual separates herself from the entity, and escapes personal responsibility for the entity’s obligations.” *Id.* at 2797 (Ginsburg, J., dissenting).

47. Richmond McPherson & Nader Raja, *Corporate Justice: An Empirical Study of Piercing Rates and Factors Courts Consider when Piercing the Corporate Veil*, 45 WAKE FOREST L. REV. 931, 931 (2010). Professor Wormser first popularized the phrase “piercing the corporate veil” in the early 1900s. *See* I. Maurice Wormser, *Piercing the Veil of Corporate Entity*, 12 COLUM. L. REV. 496 (1912). It is still the label applied to the judicial doctrine that allows a court to sometimes disregard the attribute of limited liability to shareholders in order to promote equity.

48. *See infra* Part I.

49. *See infra* Part II.

50. *See infra* Part III.

51. *See infra* Part IV.

## I. PIERCING THE VEIL: THE BASICS

It is generally accepted that a corporation exists within limits and structures imposed by state statutes.<sup>52</sup> Even if the corporation is thought of as reflecting the quasi-contractual agreement among shareholders, state corporate statutes impose limits on what those contracts can and must include.<sup>53</sup> These statutes typically require a corporation to operate by certain rules if the full benefits of corporate personhood, such as limited liability for shareholders, are to be retained.<sup>54</sup> One of the basic rules applicable to most corporations is that the shareholders generally do not have direct managerial rights even if they “own” the business as a result of their investment in the corporation’s shares.<sup>55</sup> This is true even if a single individual owns all of the outstanding shares that have been issued by the corporation.<sup>56</sup>

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52. See 18 AM. JUR. 2D *Corporations* § 14 (2015) (citations omitted).

53. See *id.*

54. See *id.*

55. Most state corporate statutes do allow closely held corporations to elect to dispense with the board of directors and reserve management authority to the shareholders, but even in those instances a shareholder acting as a manager has a different role and responsibilities than a shareholder merely acting as an owner seeking to further his, her or its own interests. See JAMES D. COX & THOMAS LEE HAZEN, 1 *CORPORATIONS* § 9:13, at 447 (2d ed. 2003). Oklahoma law, which would govern Hobby Lobby and Mardel, provides that:

The business and affairs of every corporation organized in accordance with the provisions of the Oklahoma General Corporation Act shall be managed by or under the direction of a board of directors, except as may be otherwise provided for in this act or in the corporation’s certificate of incorporation. If any provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by the provisions of this act shall be exercised or performed to the extent and by the person or persons stated in the certificate of incorporation.

OKLA. STAT. tit. 18, § 1027(A) (2011).

Pennsylvania statutes (which would govern Conestoga) include a similar provision:

Unless otherwise provided by statute or in a bylaw adopted by the shareholders, all powers enumerated in section 1502 (relating to general powers) and elsewhere in this subpart or otherwise vested by law in a business corporation shall be exercised by or under the authority of, and the business and affairs of every business corporation shall be managed under the direction of, a board of directors. If any such provision is made in the bylaws, the powers and duties conferred or imposed upon the board of directors by this subpart shall be exercised or performed to such extent and by such person or persons as shall be provided in the bylaws. Persons upon whom the liabilities of directors are imposed by this section shall to that extent be entitled to the rights and immunities conferred by or pursuant to this part and other provisions of law upon directors of a corporation.

15 PA. CONS. STAT. § 1721(a) (2001).

56. See, e.g., *Watercolor Grp., Inc. v. William H. Newbauer, Inc.*, 360 A.2d 200, 207 (Pa. 1976) (citing *Barium Steel Corp. v. Wiley*, 108 A.2d 336, 341 (Pa. 1954); *Wedner v. Unemp’t Comp. Bd. of Review*, 296 A.2d 792, 794 (Pa. 1972)) (“The accepted rule in Pennsylvania is that a corporation is an entity distinct from its shareholders even if the stock is held entirely by one person.”).

Instead, it is the directors who have the power and responsibility to manage the corporation and make business decisions.<sup>57</sup> While shareholders may elect the directors, the shareholders have no right to substitute their business judgment for that of the directors.<sup>58</sup> This legal distinction does not disappear if a shareholder is elected to serve on the board.<sup>59</sup> In such a case, the shareholder-director is regarded as acting in his or her capacity as a director when exercising management decisions, and at such times is required to act for the benefit of the corporation rather than him- or herself personally.<sup>60</sup>

It is, of course, true that a closely held corporation can, in most states, elect to dispense with or limit the authority of a board of directors.<sup>61</sup> In this case, the

57. The laws of both Oklahoma, which govern both Hobby Lobby and Mardel, and Pennsylvania, which applies to Conestoga, clearly distinguish between the rights and obligations of shareholders and those of the independent corporate entity. Oklahoma courts have expressly recognized that shareholders do not have direct control of the corporation merely by reason of such ownership. *State ex rel. Okla. Emp't Sec. Comm'n v. First Nat'l Bank of Texhoma*, 174 P.2d 259, 261 (1946); *State ex rel. Okla. Emp't Sec. Comm'n v. Tulsa Flower Exch.*, 135 P.2d 46, 47 (1943). Pennsylvania courts have also recognized that matters which involve general policies of the organization and which are fundamentally important shall be determined by board of directors. *Severance v. Heyl & Patterson, Inc.*, 187 A. 53, 56 (Pa. Super. Ct. 1936). Directors of Pennsylvania corporations have the positive duty to manage the affairs of the corporation. *Metzger v. American Food Mgmt., Inc.*, 389 F. Supp. 469, 471 (W.D. Pa. 1975).

58. In Oklahoma, this principle has been reflected in court opinions. See *Renberg v. Zarrow*, 667 P.2d 465, 472 (1983) (citing *United States v. Byrum*, 408 U.S. 125, 137–38 (1972); *Pepper v. Litton*, 308 U.S. 295, 306 (1939)) (“However, a majority shareholder has a fiduciary duty not to misuse his power by promoting his personal interests at the expense of the corporation, and the majority shareholder has the duty to protect the interests of the minority.”). Pennsylvania courts have taken the same approach. See, e.g., *Ferber v. Am. Lamp Corp.*, 469 A.2d 1046, 1050 (Pa. 1983) (citing *Weisbecker v. Hosiery Patents*, 51 A.2d 811, 814, 817 (Pa. 1947)) (The majority shareholder’s fiduciary duty to minority shareholders “does not mean, of course, that majority shareholders may never act in their own interest, but when they do act in their own interest, it must be also in the best interest of all shareholders and the corporation.”). This is certainly in accord with general principles of corporate law. See, e.g., *Byrum*, 408 U.S. at 137–38 (footnote omitted) (“The power to elect the directors conferred no legal right to command them to pay or not to pay dividends. A majority shareholder has a fiduciary duty not to misuse his power by promoting his personal interests at the expense of corporate interests. Moreover, the directors also have a fiduciary duty to promote the interests of the corporation.”).

59. See, e.g., *Cookies Food Prods., Inc. v. Lakes Warehouse Distrib. Inc.*, 430 N.W.2d 447, 454–55 (Iowa 1988) (explaining shareholder-director was able to make business decisions in director capacity, not as shareholder).

60. In this regard, consider a case like *Cookies*, 430 N.W.2d 447. In *Cookies*, a shareholder derivative suit was brought against Herrig, as a shareholder-director, for breach of fiduciary duties. *Id.* at 448. The court easily concluded that “Herrig, as an officer and director of Cookies, owes a fiduciary duty to the company and its shareholders.” *Id.* at 451. It was also acknowledged that it was Herrig’s role in assuming control that resulted in these duties. *Id.*

61. For example, the Revised Model Business Corporation Act permits shareholder agreements to accomplish this result for closely held corporations. See MODEL BUS. CORP. ACT § 7.32(a)(1) (Am. Bar Ass’n 2002). Section 7.32(a)(1) of the RMBCA specifically permits enforcement of a unanimous shareholder agreement complying with various requirements even if it “eliminates the board of directors or restricts the discretion or powers of the board of directors.” *Id.* Oklahoma and Pennsylvania corporate statutes also permit this result, albeit in slightly different ways. See OKLA. STAT. tit. 18, § 1027(A) (2011); 15 PA. CONS. STAT. § 1721(a) (2001).

shareholders may be given direct managerial powers.<sup>62</sup> However, shareholders with direct management powers would be acting as if they were directors, with the obligation of advancing the corporation's interests, rather than merely serving their own objectives.<sup>63</sup> The reservation or reclamation of management authority for the shareholders in these corporations does not diminish the separate legal existence of the entity;<sup>64</sup> rather, it is a recognition that in certain close corporations a less rigid or formal operational structure is desirable.<sup>65</sup>

It is not just the fact that management authority is vested in the directors that makes it clear that corporations are legally distinct persons apart from the shareholders. Another state statutory rule is that the corporation owns its own property. Even a sole shareholder has no independent right to use or dispose of such property for the shareholder's personal benefit.<sup>66</sup> Similarly, state law generally provides that corporations enter into their own contracts and are responsible for their own debts.<sup>67</sup> Corporations may sue and be sued in their own names.<sup>68</sup> Even a sole shareholder may not sue to recover directly for harm to "his" or "her" corporation; the corporation is entitled to bring suit in its own name to enforce its rights.<sup>69</sup> The employee of a corporation is not an employee

62. See, e.g., MODEL BUS. CORP. ACT § 7.32(a)(3) (stating agreement among shareholders may establish who shall be directors and officers of the corporation).

63. See *Ferber*, 469 A.2d at 1050 (citing *Weisbecker v. Hosiery Patents*, 51 A.2d 811, 814, 817 (Pa. 1947); *Renburg*, 667 P.2d at 472 (citing *Byrum*, 408 U.S. at 137–38; *Pepper v. Litton*, 308 U.S. 295, 306 (1939)). It is also worth noting that none of the corporations in *Hobby Lobby* had made such an election. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2764–65 (2014).

64. See 1 FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 25 (rev. ed. 2015).

65. See 1A FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 70.10 (rev. ed. 2010).

66. Oklahoma cases have, for example, held that a corporate shareholder has no title or legal right to the assets of the corporation and that the shareholder's rights are limited to a proportionate share of dividends or assets upon dissolution. See *Cooke v. Tankersley*, 189 P.2d 417, 419 (Okla. 1948) (citing *People's Nat'l Bank v. Bd. of Comm'rs* 103 P. 682, 684 (Okla. 1908), *aff'd*, 104 P. 55 (Okla. 1909); 11 FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5100 (rev. ed. 2011)).

67. See also OKLA. STAT. tit. 18, § 1016(13) (2011) ("Every corporation created pursuant to the provisions of the Oklahoma General Corporation Act shall have power to . . . [m]ake contacts"); 15 PA. CONS. STAT. § 1502(a)(17) (1989) ("Subject to the limitations and restrictions imposed by statute or contained in its articles, every business corporation shall have power . . . [t]o enter into any obligation appropriate for the transaction of its affairs, including contracts or other agreements with its shareholders.").

68. E.g., 18 OKLA. STAT. tit. 18 § 1016(2) ("Every corporation created pursuant to the provision of the Oklahoma General Corporation Act shall have power to . . . [s]ue and be sued in all courts and participate, as a party or otherwise, in any judicial, administrative, arbitral or other proceeding, in its corporate name"); 15 PA. CONS. STAT. § 1502(a)(2) ("Subject to the limitations and restrictions imposed by statute or contained in its articles, every business corporation shall have power . . . [t]o sue and be sued, complain and defend and participate as a party or otherwise in any judicial, administrative, arbitral or other proceeding in its corporate name.").

69. Shareholders wishing to force a corporation to seek redress for harm in the face of opposition from the board of directors are normally relegated to bringing derivative actions. See generally DEBORAH A. DEMOTT, SHAREHOLDER DERIVATIVE ACTIONS: LAW AND PRACTICE 1, 6 (2014) ("examin[ing] in detail many of the issues raised by different facets of derivative litigation"). Even this option, which carries with it various procedural limitations and restrictions, is not without its critics:

of the corporation's shareholders,<sup>70</sup> and similarly, a shareholder's agent will lack authority to bind the corporation.<sup>71</sup>

A corresponding rule is that if a shareholder acts in a way that constitutes an abuse of the corporate form, for example by disregarding the corporation's separate existence so as to harm others and thereby violate the fundamental principles by which a corporation is said to exist, then a court may also disregard the entity to promote equity.<sup>72</sup> That, in a very brief and incomplete nutshell, is the doctrine of piercing. This particular view of piercing also provides significant insights into the question of whether a corporation should have free exercise rights. This perspective neither relies on the argument or assumption that the separation between the owners and the corporation is absolute, nor assumes that the fact that such separation does not always apply means that a corporation should properly be viewed as an association of its owners able to independently assert rights of its owners. Instead, it is a recognition of the facts that a corporation has its own legal personality, its own property, its own objectives and purposes, and its own interests; and that those have been kept legally distinct from those of the corporation's shareholders, with the potential loss of the protections of the corporate veil if those differences are not respected.

Called "ingenious" and "uniquely complicated," shareholder derivative litigation has sparked considerable controversy since its inception 150 years ago. These remarkable suits permit shareholders to sue derivatively on their corporation's behalf. The litigation's controversial nature results from the competing tensions underlying such unusual relief. One perspective embraces derivative suits as an invaluable procedural vehicle permitting shareholders to champion their corporation's rights when corporate management refuses to do so. The opposing view cautions that corporations, not the courts, should resolve internal conflicts, and that derivative litigation necessarily raises the specter of shareholder strike suits and undue judicial interference with the business judgments of management.

Carol B. Swanson, *Juggling Shareholder Rights and Strike Suits in Derivative Litigation: The ALI Drops the Ball*, 77 MINN. L. REV. 1339, 1340–41 (1993) (footnote omitted).

70. To treat a shareholder as being, in some sense, responsible for or to the corporation's employees, in fact, the courts normally turn to the very doctrine that is the heart of this article: piercing the veil:

Fundamental doctrine deems a corporation to be separate and distinct from its owners, so that shareholder—whether they be individual investors or a corporate parent—will not ordinarily be held responsible for corporate obligations. This "corporate veil" is usually only "pierced," and shareholder liability imposed, when a corporation's owners have abused the privilege of limited liability in some manner.

Wilson McLeod, *Shareholders' Liability and Workers' Rights: Piercing the Corporate Veil Under Federal Labor Law*, 9 HOFSTRA LAB. L.J. 115, 115 (1991).

71. The normal rule is that it is not possible to delegate more power than you have. RESTATEMENT (THIRD) OF AGENCY § 3.04(1) (Am. Law Inst. 2006) (specifying that "[a]n individual has capacity to act as principal in a relationship of agency as defined in § 1.01 if, at the time the agent takes action, the individual would have capacity if acting in person."). Since a shareholder has no power to bind the corporation merely by virtue of owning shares (that power being held by directors), the shareholder cannot authorize someone else to exercise that power either.

72. For a more detailed explanation of when a court may disregard the separate existence of the corporate form, see *infra* Part II.

## II. THE DOCTRINE OF PIERCING IN MORE DETAIL

The doctrine of piercing begins with the notion that in the usual course of things, the modern corporate form does offer its “owners” limited liability.<sup>73</sup> The historical justification for this was, at least in part, the fear that without such protection for investors only the elite would be able to participate in economic endeavors, because only they would have the time to oversee their investments and sufficient sums to invest so that their time would be well spent in monitoring the business.<sup>74</sup> This, in turn, would have at least potentially resulted in an increasing concentration of wealth in the hands of a few.<sup>75</sup> From a different theoretical perspective, the doctrine of limited liability also makes sense because of the separate legal existence of the corporation apart from its owners and the fact that the corporation has its “own” assets out of which to satisfy obligations.<sup>76</sup> Regardless of how we arrived at this point, it certainly seems beyond dispute that limited liability is an essential hallmark of the modern corporate form in the United States,<sup>77</sup> one which has been described as a “first principle” of corporate law.<sup>78</sup>

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73. See Daniel R. Kahan, Note, *Shareholder Liability for Corporate Torts: A Historical Perspective*, 97 GEO. L.J. 1085, 1086 (2009).

74. One early scholar even claimed that the notion of limited liability for corporate shareholders was “the greatest single discovery of modern times” and that “[e]ven steam and electricity are far less important than the limited liability corporation, and they would be reduced to comparative impotence without it.” NICHOLAS MURRAY BUTLER, *WHY SHOULD WE CHANGE OUR FORM OF GOVERNMENT?* 82 (1912). And almost ninety years ago, another commentator wrote that “[t]he economic historian of the future may assign to the nameless inventor of the principle of limited liability, as applied to trading corporations, a place of honour with Watt and Stephenson, and other pioneers of the Industrial Revolution.” FRANKLIN GEVURTZ, *GLOBAL ISSUES IN CORPORATE LAW* 23 (Thomas West 2006) (quoting *The Ownership of British Industrial Capital*, 103 ECONOMIST 1053 (Dec. 18, 1926)).

75. See Kahan, *supra* note 73, at 1091–92 (justifying the need for limited liability in the historical perspective).

76. See Robert B. Thompson, *The Limits of Liability in the New Limited Liability Entities*, 32 WAKE FOREST L. REV. 1, 7–8 (1997) (corporation seen as separate from participants). The limits on personal liability seem quite in line with the facts that a corporation can sue and be sued in its own name, can own property in its own name, can sign contracts in its name (albeit only through the conduct of its agents), and can conduct its own business apart from the business of its shareholders and not even be controlled by its shareholders. See also Daniel J. Morrissey, *Piercing All the Veils: Applying an Established Doctrine to a New Business Order*, 32 J. CORP. L. 529, 537 (2007) (citing MODEL BUS. CORP. ACT §§ 7.28(a), 8.01(b) (1985); Theresa A. Gabaldon, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*, 45 VAND. L. REV. 1387, 1400–02 (1992) (noting that even though stockholders typically elect directors, “it is the board that runs the corporation’s business”); *Smith v. Van Gorkom*, 488 A.2d 858, 888 (Del. 1985); John H. Matheson & Raymond B. Eby, *The Doctrine of Piercing the Veil in an Era of Multiple Limited Liability Entities: An Opportunity to Codify the Test for Waiving Owners’ Limited Liability Protections*, 75 WASH. L. REV. 147, 156 (2000).

77. Admittedly, this was not always the case in the United States. California, for example, delayed providing limited liability to corporate stockholders until 1931. GEVURTZ, *supra* note 74, at 23. For a more complete exposition of the history of limited liability as a hallmark of corporate form, see E. Merrick Dodd, *The Evolution of Limited Liability in American Industry*:

In counterpoint to limited liability being the “usual” result in the corporate setting, American courts have always been willing to find that such limited liability should not be absolute.<sup>79</sup> There are a number of instances where the potential for abuse of the corporate form and the privilege of limited liability has resulted in judicial intervention to protect claimants from fundamental injustice, inequity or unfairness.<sup>80</sup> One of the more frequently cited statements of the general rule comes from Judge Sanborn in *United States v. Milwaukee Refrigerator Transit Co.*:<sup>81</sup>

[A] corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.<sup>82</sup>

For more than a hundred years, courts have used language like “alter ego”<sup>83</sup> and “instrumentality”<sup>84</sup> to “explain” when the veil of limited liability should be pierced.<sup>85</sup> Other labels have also been used,<sup>86</sup> although they are no more precise, and no less illustrative of the general notion that courts are likely to disregard the corporation’s separate existence and limited liability for shareholders if the

*Massachusetts*, 61 HARV. L. REV. 1351 (1948) (discussing the development of limited liability in Massachusetts).

78. See, e.g., 1 FLETCHER, *supra* note 64, § 41.77 (discussing the issue of using veil piercing as a remedy against limited liability companies); STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL § 1.1, at 6 (2012), (referring to “the first principle[]” of shareholder limited liability).

79. “For as long as limited liability has existed, courts have disregarded the form of malefasant corporate entities to access a shareholder’s own assets.” Peter B. Oh, *Veil-Piercing*, 89 TEX. L. REV. 81, 83 (2010) (citing KAREN VANDEKERCKHOVE, PIERCING THE CORPORATE VEIL 76 (2007)).

80. See *Sanders v. Roselawn Mem’l Gardens, Inc.*, 159 S.E.2d 784, 800 (W. Va. 1968) (quoting 18 AM. JUR. 2D *Corporations* §§ 45–46 (2015)) (stating that a corporation as a separate entity should be disregarded if it would prevent injustice or inequitable results).

81. *United States v. Milwaukee Refrigerator Transit Co.*, 142 F. 247 (E.D. Wis. 1905).

82. *Id.* at 255.

83. See, e.g., *id.* at 253 (describing a firm as the “alter ego” of a “dummy” corporation); *Cheaney v. Ocean S.S. Co.*, 19 S.E. 33, 35 (Ga. 1893) (describing an agent as an “alter ego”).

84. HARRY G. HENN, HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES § 146, at 250 n.2 (2d ed. 1970).

85. See *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926) (discussing the use of metaphors to determine if the corporation as a separate entity will be ignored).

86. Such labels have included all of the following, in alphabetical order: “adjunct,” “agent,” “alias,” “alter ego,” “alter idem,” “arm,” “blind,” “branch,” “buffer,” “cloak,” “coat,” “conduit,” “cover,” “creature,” “delusion,” “department,” “device,” “double,” “dummy,” “fiction,” “form,” “instrumentality,” “marionette,” “monkey’s paw,” “mouthpiece,” “name,” “nominal identity,” “phase,” “puppet,” “screen,” “sham,” “shell,” “simulacrum,” “snare,” “stooge,” “subterfuge,” “tool.” Oh, *supra* note 79, at 83 n.7 (2010) (citations omitted).

owners are using the business in such a way as to advance only their personal interests rather than the corporation's legal interests.<sup>87</sup>

Another way of looking at piercing is the consideration of whether the shareholders completely dominated and controlled the business so as to further their personal aims.<sup>88</sup> Most courts also assess the equities of the situation before allowing a claimant to pierce the veil,<sup>89</sup> but this is in addition to the requirement that the corporation was being treated by the shareholders as if it did not have a separate legal purpose and existence.<sup>90</sup> Not even a sole shareholder may treat the corporation as if it exists solely for his or her own benefit, but instead is expected to treat the corporation as a separate and distinct entity.<sup>91</sup>

87. See, e.g., *Victoria Elevator Co. v. Meriden Grain Co.*, 283 N.W.2d 509 (Minn. 1979) (talking about piercing limited liability in terms of fairness). "Since defendant did not treat the corporation as a separate legal entity, he should not be entitled to its protection against personal liability." *Id.* at 513.

88. One of the most commonly used tests asks whether the shareholders have so "dominated or controlled" the corporation that it no longer has a separate existence. Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1063 tbl.11 (1991) (observing that this was mentioned by the courts as a factor in 551 of the approximately 1600 piercing opinions included in his survey).

89. See, e.g., *Laya v. Erin Homes, Inc.*, 352 S.E.2d 93, 99 (W. Va. 1986) (discussing if an inequitable result would occur as being a factor to consider when piercing the corporate veil).

90. See, e.g., *Van Dorn Co. v. Future Chem. & Oil Corp.*, 753 F.2d 565, 569–70 (7th Cir. 1985) (quoting *Macaluso v. Jenkins*, 420 N.E.2d 251, 255 (Ill. App. Ct. 1981); *Gallagher v. Reconco Builders, Inc.*, 415 N.E.2d 560, 563 (Ill. App. 1980); *People ex rel. Scott v. Pintozzi*, 277 N.E.2d 844, 851–52 (Ill. 1971); *Dregne v. Five Cent Cab Co.*, 46 N.E.2d 386, 391 (Ill. 1943)) ("[F]irst there must be such unity of interest and ownership that the separate personalities of the corporation and the individual [or other corporation] no longer exist; and second, circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice."); *Micciche v. Billings*, 727 P.2d 367, 373 (Colo. 1986) (en banc). The court in *Micciche* explained that piercing would be possible "if it is shown that shareholders used the corporate entity as a mere instrumentality for the transaction of their own affairs without regard to separate and independent corporate existence, or for the purpose of defeating or evading important legislative policy, or in order to perpetrate a fraud or wrong on another . . . ." *Id.* See also *Phillips v. Englewood No. 322 Veterans of Foreign Wars, Inc. (In re Interest of Phillips)*, 139 P.3d 639, 644 (Colo. 2006) (en banc) (citing *Water, Waste & Land, Inc. v. Lanham*, 955 P.2d 997, 1004 (Colo. 1998) (en banc)) (referencing the equitable nature of the doctrine by specifying that "the court must evaluate whether an equitable result will be achieved by disregarding the corporate form and holding the shareholder personally liable for the acts of the business entity.").

91. An illustrative case from Pennsylvania explained that under that state's law, "the corporate veil is properly pierced whenever one in control of a corporation uses that control or corporate assets to further [his] own personal interests." *Watercolor Grp. v. William H. Newbauer, Inc.*, 360 A.2d 200, 207 (Pa. 1976) (citing *Walkovszky v. Carlton*, 223 N.E.2d 6, 8 (N.Y. 1966); *Minton v. Cavaney*, 364 P.2d 473, 475 (Cal. 1961). Oklahoma law holds that the purpose of the piercing doctrine is "to impute liability for the acts of the corporation to the responsible persons." *Rogers v. Rahill (In re Estate of Rahill)*, 827 P.2d 896, 897 (Okla. App. 1991). A more recent Oklahoma opinion cited the Colorado Supreme Court's opinion in *Micciche v. Billings* for the proposition that "a corporation is treated as a legal entity separate from its shareholders, thereby permitting shareholders to commit limited capital to the corporation with the assurance that they will have no personal liability for the corporation's debts. When, however, the corporate structure is used so improperly that the continued recognition of the corporation as a separate legal entity would be unfair, the corporate entity may be disregarded and corporate principals held liable for the



## III. RECOGNIZING AND PROTECTING CORPORATE INTERESTS

Returning for a moment to *Burwell v. Hobby Lobby*,<sup>92</sup> it is indeed true, as Justice Alito wrote, that “[c]orporations, ‘separate and apart from’ the human beings who own, run, and are employed by them, cannot do anything at all.”<sup>93</sup> But this does not mean that, as agents for the corporation, those human beings should be allowed to use the corporation, and to accept the concomitant benefit of limited personal liability, to further their own interests as distinct from the interests of the corporation.

Of course there may be overlap in those interests. A for-profit corporation is likely to “want” to be profitable. Its shareholders will presumably desire the same thing. A corporation is likely to want to protect its property. Again, the shareholders of the corporation will benefit from such protections (albeit derivatively), and are likely to want the same thing. Similarly, a corporation may have a reasonable interest in promoting or opposing certain regulatory measures, which may justify a corporation spending funds to lobby in favor of whatever position will benefit the corporation’s economic objectives. The shareholders may well share those opinions, but in any event the corporation itself could stand to gain from advancing those views.

Because a corporation has legitimate economic interests in its own business and property, even as an artificial person, it makes sense that it should also have the legal right and power to protect and advance those interests. In this regard, consider the constitutional rights and protections that have been afforded corporations.<sup>94</sup> The granting of these rights has been a gradual process playing out over the past 200 years, but even a cursory review of Supreme Court jurisprudence reveals that such protections have gradually been expanded as the role and importance of corporations in society has increased.<sup>95</sup> For example, in the early nineteenth century, the U.S. Supreme Court recognized that corporations have a “right” to an independent, autonomous existence that need not be tied to that of its shareholders.<sup>96</sup> This particular right is clearly in accord

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corporation’s actions.” *Thomas v. Vertigo, Inc.*, 900 P.2d 458, 460 (Okla. App. 1995) (quoting *Micicche*, 727 P.2d at 372–73).

92. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

93. *Id.* at 2768.

94. *See, e.g.*, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (stating that corporations have freedom of speech protection under the First Amendment); *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (saying that corporations have a right to privacy to protect themselves from unreasonable searches); *Minneapolis and St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26, 33 (1889) (recognizing corporations have due process rights under the Fourteenth Amendment); *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886) (saying that corporations have equal protection rights under the Fourteenth Amendment).

95. *See* Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 42 HASTINGS L.J. 577, 664–67 (1990) (containing an excellent summary of these developments).

96. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 611 (1819) (recognizing the right under the Contracts Clause of Article I to unalterable terms of incorporation).

with the notion that a corporation has an existence distinct from that of its shareholders.

Similarly, a series of cases in the nineteenth century gave corporations access to the federal courts by determining that corporations should count as citizens of the states in which they were incorporated for jurisdictional purposes.<sup>97</sup> This, too, is a right that reinforces the notion that a corporation is legally distinct from its shareholders and that it is the corporation's state of incorporation that matters, not the residence or domicile of its owners.

Because corporations can own property, it also makes sense that they should be able to protect such property rights, both as a matter of equal protection and due process. In the late nineteenth century, in *Santa Clara County v. Southern Pacific Railroad Co.*,<sup>98</sup> the Supreme Court appeared to recognize corporate equal protection rights under the Fourteenth Amendment.<sup>99</sup> The Court thereafter recognized corporate due process rights in *Minneapolis and St. L. Ry. Co. v. Beckwith*,<sup>100</sup> and *Noble v. Union River Logging R. Co.*<sup>101</sup>

In the twentieth century, intangible rights became increasingly important to corporations as their size and influence, or potential influence, began to grow.<sup>102</sup> In 1906, the Court determined that corporations should be able to exercise the right to privacy in order to protect their property from unreasonable searches.<sup>103</sup> Other intangible rights followed.<sup>104</sup>

One of the most significant rights now recognized for corporations involves the protection of commercial speech.<sup>105</sup> Commercial speech did not receive much in the way of constitutional protection until the latter half of the twentieth century.<sup>106</sup> Until the 1970s, advertising was generally regarded as being outside

97. *E.g.*, *Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. (16 How.) 314, 329 (1853), *superseded by statute*, Pub. L. No. 85-554, 72 Stat. 415, *as recognized in* *Hertz Corp. v. Friend*, 559 U.S. 77 (2010); *Louisville, Cincinnati & Charleston R.R. Co. v. Leston*, 43 U.S. (2 How.) 497, 511 (1844); *Bank of U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 82–83 (1809).

98. *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886).

99. *Id.* at 396.

100. *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26, 36 (1889) (recognizing what would not violate deprivation of property without due process of law).

101. *Noble v. Union River Logging R.R. Co.*, 147 U.S. 165, 176 (1893) (“A revocation of the approval of the secretary of the interior, however, by his successor in office, was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void.”).

102. Mayer, *supra* note 95, at 582–83.

103. *Hale v. Henkel*, 201 U.S. 43, 76 (1906).

104. *See, e.g.*, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 775–76 (1978) (saying that a criminal statute violated a corporation's First Amendment rights); *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (saying that the Fifth Amendment's double jeopardy clause barred a retrial of defendants, including a corporation).

105. *See* *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976).

106. *See, e.g.*, *Bates v. State Bar of Az.*, 433 U.S. 350 (1977) (stating that banning attorney advertising inherently denies potential clients relevant information they may need in making the decision of who to hire); *Linmark Assoc., Inc. v. Twp. of Willingboro*, 431 U.S. 85 (1977) (stating that forbidding “For Sale” signs was against the First Amendment); *Virginia State Bd. of Pharm.*,

the ambit of the First Amendment.<sup>107</sup> In 1976, however, the Court reversed this position.<sup>108</sup> In *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court considered a challenge to a Virginia statute prohibiting the advertising of prices for prescription drugs brought by a consumer group claiming that it had a right to receive such information.<sup>109</sup> The Court concluded that commercial speech could not be denied First Amendment protection merely because of its nature.<sup>110</sup>

Almost immediately, corporations began pushing for greater protections for their commercial speech.<sup>111</sup> The efforts seem geared both at opposing government regulation of corporate activities and protecting corporations' modern property interests.

In 1980, an electric utility company challenged a New York state regulation which prohibited utilities from encouraging the use of electricity in their advertising.<sup>112</sup> The Court used a balancing test<sup>113</sup> since commercial speech receives a lower level of first amendment protection than core political speech,<sup>114</sup> but still struck down the regulation on the grounds that it was over-broad when compared with the rights of consumers.<sup>115</sup> In the course of its opinion, the Court appeared to acknowledge that, in the modern political and economic setting, communication can be seen as a form of property.<sup>116</sup> Commercial speech was defined by the Court as "expression related solely to the economic interests of the speaker and its audience."<sup>117</sup>

425 U.S. 748 (overruling a state law that forbid pharmacists from advertising prescription drugs because the ban adversely affected the flow of information to consumers).

107. The Supreme Court initially addressed the issue of First Amendment protections for commercial speech in 1942, in *Valentine*. *Valentine v. Chrestensen*, 316 U.S. 52 (1942), *overruled by Virginia State Bd. of Pharm.*, 425 U.S. 748. *Valentine* involved an ordinance which prohibited the distribution of handbills, which the Court upheld, saying that "purely commercial advertising" has no First Amendment protection. *Id.* at 54.

108. *Virginia State Bd. of Pharm.*, 425 U.S. 748.

109. *Id.* at 753–54.

110. In that case, the Court determined that the public's interest in receiving the information outweighed the asserted governmental interests in prohibiting its dissemination. *Id.* at 773.

111. *See, e.g.*, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 558 (1980) (looking at whether regulation bans promotional advertising by an electrical utility).

112. *Id.* at 560.

113. *Id.* at 566 (implementing a balancing test with a four step analysis pertaining to commercial speech protections).

114. *Id.* at 562–63 (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456–57 (1978)).

115. *Id.* at 571–72. At about the same time, the Court also struck down a range of advertising bans—all on the grounds that the public had a right to such information. *See, e.g.*, *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (legal services); *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977) (birth control); *Linmark Assoc., Inc. v. Twp. of Wilinoro*, 431 U.S. 85 (1977) (real estate); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (abortions).

116. *See generally Cent. Hudson*, 447 U.S. 557 (stating that expression may be related to economic interests).

117. *Id.* at 561 (citing *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976); *Bates*, 433 U.S. at 363–64; *Friedman v. Rogers*, 440 U.S. 1, 11 (1979)).

Obviously, commercial speech rights are not of equal economic importance to all corporations. For example, companies dependent on consumer advertising logically have the greatest stake. Notwithstanding this fact, as a general rule, for-profit corporations appear to share in the belief that commercial free speech is a valuable property right that should be vigorously protected.<sup>118</sup> “The corporate legal literature now promotes commercial speech as a component of the bottom line, to be carefully monitored with an eye towards encroaching government regulation.”<sup>119</sup> Corporate support for free speech as a method of advancing the corporation’s bottom line is vigorous and pro-active.<sup>120</sup>

Corporations also assert constitutional rights, such as free speech, to advance other agendas that are not as clearly rooted in protection of corporate property interests.<sup>121</sup> Corporations often support anti-regulation agendas, typically as a means of enhancing profitability. In these cases, the emphasis on corporate rights may legitimately be viewed as an extension of the power to protect economic and business rights. Then, in 1978 the Court made it clear that governments could not require corporations to prove a link between their speech and their economic interests in order to receive First Amendment protections.<sup>122</sup> In *First National Bank of Boston v. Bellotti*, the Court rejected the notion that corporations could be said to have free speech rights only if they could prove that the speech in question “pertains directly to the corporation’s business interests.”<sup>123</sup> Instead, the majority opinion, authored by Justice Powell, found that the values behind the First Amendment included the free flow of ideas, and that the “inherent worth of the speech in terms of its capacity for informing the

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118. As one legal commentator has noted, “corporations from diverse sectors publicly advocate commercial free speech rights and view them as property rights.” Mayer, *supra* note 95, at 613.

119. *Id.*

120. Consider, for example, the following excerpt from an editorial published by Mobil Oil Corporation: “We maintain that voices in a democratic society—individual and corporate alike—shouldn’t be stifled or filtered through Big Nanny.” *With Liberty and Justice (and Free Speech) for Some*, N.Y. TIMES, Sept. 10, 1987, at A31. “Whether the topic is cigarettes, or energy policy, or the latest in designer jeans, the first amendment shield must never be lowered, or selectively applied.” *Id.* This particular “advertorial,” a term coined to describe the blurring of the lines between information and advertising, was particularly mentioned in Mayer, *supra* note 95, at 613 n.184. He chose this because Mobil Oil Corporation’s opinions seem to be an “accurate barometer of Fortune Five Hundred opinions.” *Id.* See also Cynthia Crossen, *Proliferation of ‘Advertorials’ Blurs Distinction Between News and Ads*, WALL ST. J., Apr. 21, 1988, § 2, at 33. The focus on the corporate bottom line is apparent in a wide range of materials dealing with the issue of commercial free speech. See, e.g., Robert Posch Jr., *Commercial Free Speech the Argument for Our Side*, DIRECT MARKETING, Feb. 1983, at 92. Accord Daryl G. Hatano, *Should Corporations Exercise Their Freedom of Speech Rights?*, 22 AM. BUS. L.J. 165 (1984); Edward L. Barrett, Jr., “*The Unchartered Area*”—*Commercial Speech and the First Amendment*, 13 U.C. DAVIS L. REV. 175 (1980).

121. See, e.g., *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010); *Pac. Gas & Elec. Co. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1 (1986).

122. See *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

123. *Id.* at 777.

public does not depend upon the identity of its source, whether corporation, association, union, or individual.”<sup>124</sup>

A somewhat more nuanced examination of the case suggests that there may indeed have been legitimate economic interests at stake in *Bellotti*. The speech at issue in that case had to do with opposition to a particular ballot initiative that, in the view of some, could have had a serious detrimental effect on the state economy.<sup>125</sup> Whether or not this would have amounted to a “material” impact on the corporation’s business,<sup>126</sup> protecting the economy certainly relates to the profitability of a business, and is not irrelevant to the business’ objectives.

Quite aside from this, however, is the fact that corporations clearly have their “own” interests worth protecting and advancing through their speech. They have a legitimate interest in speaking in support of those interests, and adding those “corporate voices” to public discussion not only potentially serves the interests of the corporations, it also advances the interest of the public in having access to all points of view.

Even recognizing that corporations have gradually been given substantially greater constitutional rights, *Hobby Lobby* appears to be a startling departure from prior precedents. None of the constitutional rights previously granted to corporations parallel free exercise rights.<sup>127</sup> A corporation has its own existence, and recognizing the perpetual, independent existence of the corporation’s rights and protections apart from those of its owners is perfectly consistent with and can be said to stem from that fact. A corporation has its own property, and constitutional due process protections and the protection against unreasonable searches and seizures protect that aspect of corporate personhood.<sup>128</sup> As a legal person, corporations have a legitimate interest in acting to support their business objectives, directly and indirectly, and the recognition of free speech rights may again be seen as consistent with corporations’ own interests. On the other hand, a for-profit corporation not only does not have religious interests of its own, it is incapable of having such interests.<sup>129</sup>

Corporations do not “go” to church. They do not have souls. They are “artificial,” not “natural persons,”<sup>130</sup> and no mainstream church has proposed accepting corporations as members of the congregation. Even nonprofit corporations do not have independent religious views or opinions; they are

124. *Id.*

125. *Id.* at 770.

126. The state legislature had specifically determined that the impact of ballot initiatives was deemed not to have a material impact on any corporation’s business. *See id.* at 768 (quoting MASS. GEN. LAWS ch. 55, § 8 (Supp. 1977)).

127. *See, e.g.,* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

128. *See G. M. Leasing Corp. v. United States*, 429 U.S. 338, 353, 97 S. Ct. 619, 629 (1977) (stating that a corporation’s Fourth Amendment rights include due process protections and protection from unreasonable search and seizure).

129. *Hobby Lobby*, 134 S. Ct. at 2774.

130. *Id.* at 2794 (Ginsburg, J., dissenting) (quoting *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819)).

simply associations organized for the purpose of allowing a religion's adherents to come together in order to promote the jointly-held beliefs of the individuals who choose to associate in this manner. That is an entirely different kind of "corporation" from a for-profit business entity, even if they are both called "corporations."

The truth is that nonprofit corporations are not set up the same way as for-profit corporations,<sup>131</sup> do not operate the same way,<sup>132</sup> and are not generally governed by the same rules.<sup>133</sup> Most states have entirely separate statutes designed to govern nonprofit corporations.<sup>134</sup> Even nonprofit corporations organized for religious purposes do not have shareholders the same way that business corporations do.<sup>135</sup> The participants in a not-for-profit venture need not be given stock in return for their contributions or donations, nor are they generally given the right to vote based on how much they contribute.<sup>136</sup> Moreover, the duties of the directors in a non-profit enterprise do not focus on the economic growth of the venture, but rather on advancing the underlying objectives of the group which, by definition, cannot be profit making.<sup>137</sup> Of course there are some similarities: both are called corporations and both have legal personality. This latter attribute means that both can have continuous legal existence, the right to own and control property, the rights to sue and be sued,

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131. See, e.g., Clyde E. Hull & Brian H. Lio, *Innovation in Non-profit and For-profit Organizations: Visionary, Strategic, and Financial Considerations*, 6 J. OF CHANGE MGMT. 53 (2006).

132. See *id.*

133. See *id.*

134. "Virtually all states have statutes providing for the formation of charitable, educational, literary, scientific, social, fraternal, religious, recreational, and other non-profit corporations." JAMES D. COX & THOMAS LEE HAZEN, COX & HAZEN ON CORPORATIONS § 1.18, at 67 (2D ED. 2003). See also HOWARD L. OLECK, NONPROFIT CORPORATIONS, ORGANIZATIONS, & ASSOCIATIONS 57-74 (5th ed. 1988).

135. "A nonprofit corporation usually does not take the form of a stock corporation." COX & HAZEN, *supra* note 134, § 1.18, at 69. In fact, the Revised Model Non-Profit Corporation Act drafted by the Corporation, Banking and Business Law section of the American Bar Association, and a number of other non-profit corporation statutes, make no provisions at all for issuance of shares of stock. See, e.g., MODEL NON-PROFIT CORP. ACT § 11 (Am. Bar Ass'n 2008). Only a few statutes allow nonprofit corporations to issue shares of stock. See, e.g., LA. STAT. ANN. § 12:210 (1994).

136. COX & HAZEN, *supra* note 134, § 1.19, at 69 n.7.

137. Thomas Lee Hazen & Lisa Love Hazen, *Punctilios and Nonprofit Corporate Governance—A Comprehensive Look at Nonprofit Directors' Fiduciary Duties*, 14 U. PA. J. BUS. L. 347 (2012) (explaining a director's duty of care, duty of loyalty, duty of good faith, and duty of obedience). Similarly, when directors in a nonprofit fail to live up to these responsibilities to advance the interest of the enterprise, generally there are legal remedies available, even if they do not parallel exactly the remedies that may be maintained against directors of for-profit corporations. "Nonprofits do not have shareholders, but there may still be constituencies who arguably should be able to bring derivative suits. For example, in a membership nonprofit, the ability to bring a derivative suit could be conferred on members . . . . Today, most nonprofit corporation acts recognize a derivative suit by members or directors." *Id.* at 411.

and the right to have agents act on behalf of them.<sup>138</sup> But a for-profit corporation has an entirely different focus.

Piercing cases also reflect the opposing natures of business-oriented and non-profit corporations.<sup>139</sup> Despite the fact that there are thousands of opinions applying the doctrine of piercing to for-profit corporations, only a handful of cases have involved the piercing of a non-profit corporation or foundation.<sup>140</sup>

There are isolated examples of cases where, under extraordinary facts, courts have disregarded the existence of a non-profit enterprise on equitable grounds, relying on the doctrine of piercing.<sup>141</sup> In 1995, a Florida appellate court issued a per curiam opinion in a divorce case revising a trial court ruling that non-profit status precludes piercing of the veil.<sup>142</sup> In doing so, the court specifically noted that non-profit enterprises were not controlled in the same way as for-profit entities.<sup>143</sup> Despite this, the appellate court ruled that if an individual exercised control over the non-profit corporation so as to turn the non-profit into that individual's alter ego, piercing could be available.<sup>144</sup>

In 1982, a Georgia court also decided that piercing was a theory that could apply to a private foundation.<sup>145</sup> *Public Interest Bounty Hunters v. Board of Governors of the Federal Reserve System* involved an individual who formed a non-profit to evade a rule that barred him from suing personally under the doctrine of *res judicata*.<sup>146</sup> The judge determined that the foundation was a legal fiction that could be disregarded because it had been established with virtually no assets merely as an instrumentality to avoid application of laws to the founder.<sup>147</sup>

In the other cases where piercing appears to have been applied to a non-profit enterprise the reasoning was not just that an individual owner or manager of the non-profit was somehow abusing the entity's separate legal personality, but that the non-profit was so intertwined with another entity that piercing could

138. See generally COX & HAZEN *supra* note 134, § 7 (explaining the separate corporate entity and its privileges and limitations).

139. See, e.g., *Micciche v. Billings*, 727 P.2d 367, 373 (Colo. 1986) (en banc); *Phillips v. Englewood No. 322 Veterans of Foreign Wars, Inc. (In re Interest of Phillips)*, 139 P.3d 639, 644 (Colo. 2006) (en banc) (citing *Water, Waste & Land, Inc. v. Lanham*, 955 P.2d 997, 1004 (Colo. 1998) (en banc)).

140. See, e.g., *Barlineau v. Barineau*, 662 So. 2d 1008 (Fla. Dist. Ct. App. 1995); *Pub. Interest Bounty Hunters v. Bd. of Governors of the Fed. Reserve Sys.*, 548 F. Supp. 157 (N.D. Ga. 1982).

141. See *Barineau v. Barineau*, 662 So. 2d 1008, 1009 (Fla. Dist. Ct. App. 1995).

142. See *id.*

143. *Id.* (citing 1 FLETCHER, *supra* note 64, § 41.77).

144. *Id.* (citing 1 FLETCHER, *supra* note 64, § 41.77).

145. *Pub. Interest Bounty Hunters v. Bd. of Governors of the Fed. Reserve Sys.*, 548 F. Supp. 157, 162 (N.D. Ga. 1982).

146. *Id.* at 162.

147. *Id.* at 162–63.

be applied.<sup>148</sup> For example, in *Macaluso v. Jenkins*, an Illinois appellate court dealt with the situation where a director of a non-profit enterprise withdrew funds from the non-profit for his personal use and to further the interests of his for-profit business.<sup>149</sup> The director co-mingled assets of the nonprofit with his own, and caused the nonprofit to supply services to his for-profit business for his personal benefit.<sup>150</sup>

In other cases, the relationship between the multiple entities was even more significant.<sup>151</sup> In a 1984 opinion, the Connecticut Supreme Court determined that two corporations, both organized to carry on little league baseball, should be subject to piercing in order to apply an injunction to the second corporation that was originally applicable to only the first corporation.<sup>152</sup> In this case, an injunction was issued against the first corporation and a second corporation was thereafter formed, with officers “practically identical” to first, for the purpose of evading the original injunction.<sup>153</sup> Similarly, in *Lake Otis Clinic, Inc. v. State*, the Alaska Supreme Court held a not-for-profit hospital and its president liable for misuse of state funds, where the hospital was undercapitalized, formalities were ignored, and the not-for-profit entity was run as if it were a division or part of a single enterprise with the president’s personal business.<sup>154</sup> In *Lycoming County Nursing Home Ass’n v. Commonwealth*,<sup>155</sup> a Pennsylvania court treated a nursing home as the alter ego of the county, a public entity, for purposes of holding the public entity to account.<sup>156</sup>

There are also a handful of cases where courts have considered the doctrine of piercing in the context of non-profit enterprises, but have declined to grant the remedy because the facts did not support it.<sup>157</sup>

The paucity of piercing cases involving not-for-profits involves at least an implicit recognition that non-profits are not the same as for-profit business

148. See, e.g., *Macaluso v. Jenkins*, 420 N.E.2d 251, 256 (Ill. App. Ct. 1981) (“A jury could have found that . . . he did exercise ownership control over the corporation to such a degree that the separate personalities . . . did not exist”).

149. *Id.* at 256.

150. *Id.*

151. See, e.g., *DeMartino v. Monroe Little League, Inc.*, 471 A.2d 638 (Conn. 1984); *Lake Otis Clinic, Inc. v. State*, 650 P.2d 388, 396 (Alaska 1982).

152. *DeMartino*, 471 A.2d at 641 (citing *Vuitton et FILS S.A. v. Carousell Handbags*, 592 F.2d 126, 130 (2d Cir. 1979)).

153. *Id.* (citing *Vuitton*, 592 F.2d at 130).

154. *Id.* at 396. The fact that the hospital was a nonprofit entity was not specifically discussed as a significant consideration in this case.

155. *Lycoming Cnty. Nursing Home Ass’n v. Commonwealth*, 627 A.2d 238 (Pa. Commw. 1993).

156. *Id.* at 243.

157. The following three cases all held that piercing was not appropriate on the facts then before the court: *Jones v. Briley*, 593 So. 2d 391, 397 (La. Ct. App. 1991) (nothing in the law prohibits persons from forming a corporation to avoid unlimited personal liability); *Christofferson v. Church of Scientology of Portland*, 644 P.2d 577, 596 (Or. Ct. App. 1981) (finding no agency); *Jabczenski v. S. Pac. Mem’l Hosps., Inc.*, 579 P.2d 53, 59 (Ariz. Ct. App. 1978) (noting that profit and nonprofit do not satisfy elements required to pierce corporate veil).



enterprises, and it is therefore a mistake to conflate the two forms of organization merely because they are both called corporations.

#### IV. CONCLUSION: WHY THIS MEANS THAT A BUSINESS CORPORATION SHOULD NOT HAVE FREE EXERCISE RIGHTS

It is axiomatic that a corporation cannot go to church. The corporation can do nothing of a religious nature.<sup>158</sup> It is not a “natural” being—it is a legal person with no tangible existence. As Justice Alito wrote in the majority opinion in *Hobby Lobby*, “[c]orporations, ‘separate and apart from’ the human beings who own, run, and are employed by them, cannot do anything at all.”<sup>159</sup> The fact that a corporation, whether organized for charitable or business purposes, can only act through its human agents, however, does not mean that a corporation does not have its own interests to protect and advance. That is, after all, the essence of corporate personhood and the very heart of the doctrine of piercing.

All of the piercing cases involving non-profit enterprises involved situations where the person in control of the entity caused it to act in a way inconsistent with its nature.<sup>160</sup> It was either designed to evade application of the law<sup>161</sup> or a previously entered injunction,<sup>162</sup> or it was operated to funnel assets and business to another entity.<sup>163</sup> The underlying purpose of a non-profit is to engage in a particular activity including a variety of socially beneficial objectives. Actions in furtherance of those purposes would not be relevant in the piercing analysis.

Similarly, the multitude of piercing cases involving for-profit enterprises also focus on whether those in control of the business have acted not in furtherance of valid business objectives but of their own personal agendas.<sup>164</sup> Obviously, in some cases there will be substantial overlap in such interests. Presumably both the corporation and its owners will be interested in protecting the corporation’s property, its assets, its reputation, its profits and its business operations. Those who act on behalf of the business as its agents have every right to take steps such as bringing and defending law suits, asserting due process and equal protection rights, and engaging in speech to defend those interests.<sup>165</sup> Speech is particularly broadly protected because it implicates the right of the public to listen as well as the right of the speaker to speak, and because there is always the risk that regulation will have a chilling effect on

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158. See *supra* note 21 for a discussion of what “religion” really involves.

159. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

160. *Macaluso v. Jenkins*, 420 N.E.2d 251, 255 (Ill. App. Ct. 1981).

161. See *Pub. Interest Bounty Hunters v. Bd. of Governors of the Fed. Reserve Sys.*, 548 F. Supp. 157, 163 (N.D. Ga. 1982).

162. See *DeMartino v. Monroe Little League, Inc.*, 471 A.2d 638, 641 (Conn. 1984) (citing *Vuitton et FILS S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979)).

163. See *Macaluso*, 420 N.E.2d at 256.

164. See *Watercolor Grp. v. William H. Newbauer, Inc.*, 360 A.2d 200, 207 (Pa. 1976).

165. See *Thompson*, *supra* note 76, at 8 (noting agent can take actions for the principal).

legitimate speech.<sup>166</sup> It is therefore a logical step to say that states may not regulate corporate speech even in the absence of proof that it directly relates to the corporation's business purpose, because corporations certainly have legitimate interests of their own to advance that may not have a direct or demonstrable connection with business objectives. However, there is no such possibility, not even a remote or tangential one, when it comes to free exercise rights.

A corporation has no religious views of its own. It has no soul; it does not go to church. The legal personality that it possesses does not and cannot extend so far. Only individuals have religious views and rights. While corporations act through individuals, when a religious viewpoint is expressed, it is necessarily that of those individuals and not that of the corporation itself. Piercing jurisprudence thus provides a lens through which it should be made clear that the majority opinion in *Hobby Lobby* fails to acknowledge the nature of the business corporation. The doctrine of piercing holds that when individuals in control of a corporation use that corporation to express their views and to advance their interests, rather than those of the corporation, those actions are improper because they fail to respect the separate existence and legal personality of the corporation.<sup>167</sup>

If the interests of the shareholders and the corporation coincide, there is no problem. Where those interests diverge, those in charge of making decisions on behalf of the corporation have never before been granted constitutional protection for causing the corporation to act in favor of their personal interests rather than in furtherance of the corporate agenda. The only way that a for-profit corporation can be said to have a religious perspective is if the views of those in control of the organization are attributed to the company, and those individuals are allowed to act in furtherance of their personal agenda even when acting in their corporate capacity.

The doctrine of piercing the veil illustrates the magnitude of this departure from what seemed to be well-established principles of corporate law. Piercing cases may be confusing and difficult to apply to specific facts, but the essential notion that corporations have personhood and legal status distinct from that of their shareholders and directors has long been a bulwark of business organizations laws in this country. It is regrettable that the majority opinion in *Hobby Lobby* overlooked or ignored this particular aspect of corporate existence, as exemplified in piercing jurisprudence in every state.

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166. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 775–76 (1978).

167. See *Van Dorn Co. v. Future Chem. & Oil Corp.*, 753 F.2d 565, 569–70 (7th Cir. 1985) (quoting *Macaluso*, 420 N.E.2d at 255) (“[F]irst, there must be such unity of interest and ownership that the separate personalities of the corporation and the individual [or other corporation] no longer exist; and second, circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice.”).

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